



WISCONSIN LEGISLATIVE COUNCIL

RULES CLEARINGHOUSE

Ronald Sklansky
Clearinghouse Director

Richard Sweet
Clearinghouse Assistant Director

Terry C. Anderson
Legislative Council Director

Laura D. Rose
Legislative Council Deputy Director

CLEARINGHOUSE RULE 01-103

Comments

[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated September 1998.]

2. Form, Style and Placement in Administrative Code

a. The one-sentence analysis of the rule does nothing more than identify the subject of the rule. It does not analyze, or even summarize, the rule. This can hardly be said to comply with the requirement of s. 227.14 (2), Stats., for a plain language analysis.

b. Section NR 328.01 is all explanatory, background information. It does not create substantive requirements, which is the kind of material usually placed in rules. This material would be more appropriately put in a guidance document for distribution to permit applicants. Alternatively, it could be put in notes to the rule or recast as departmental findings to support the specific provisions of the rule.

c. The rule frequently fails to make a complete statement of what it is intending, leaving a portion of its meaning to be inferred from context or from titles (which are not legally enforceable parts of the rule). For example, s. NR 328.02 (1) should make clear that s. 30.12 (2) and (3) (a) 3., Stats., allow the Department of Natural Resources (DNR) to issue a permit *for the placement of materials or structures on the bed of a navigable water*. That same subsection should also make clear that the purpose of that subchapter is to *establish standards for the granting of such permits* to avoid adverse effects, among other things. Section NR 328.05 (1) should specify what the alternative shore protection measures that it refers to are alternatives to, while s. NR 328.05 (2) should clearly state what should not be allowed to intrude into a waterway beyond the extent necessary to provide a sound foundation. Sections NR 328.08 and 328.23 are also deficient. For examples of good drafting, see s. NR 328.09 (2) and (3).

d. The rule frequently fails to use the active voice, resulting in unnecessary ambiguity. To the extent practical, rule provisions should be written in a form such as “X shall do Y” or “X may do Y.” For example, the first sentence of s. NR 328.06 should read something like the following: “A riparian property owner who proposes to install shore erosion control shall submit an application to the department on a form provided by the department.” Again, for examples of good drafting, see s. NR 328.09 (2) and (3).

e. Section NR 328.07 is particularly ambiguous as a result of both implying information that is not stated explicitly and using the passive voice. It should be reformatted to explicitly state that the department may approve permits for erosion control structures at the specified sites only using the specified techniques and the specified permitting processes. To achieve the greatest clarity, it may be necessary to further subdivide this section, for example, by creating separate subsections distinguishing techniques allowed at a low-energy site under a short-form permit from those allowed at a low-energy site under a long-form permit.

f. Definitions created in the rule often include substantive or descriptive material that should be placed in a substantive provision of the rule or in a note. For example, this comment applies to everything except the first sentences in the definitions of “biological erosion control,” “permanent breakwater,” “revetement,” “temporary breakwater” and “vegetated armoring,” and most of the definition of “integrated toe protection.”

g. To separate substance from definition, the definition of “predicted storm-wave height” should be reduced to “the wave height estimated under s. NR 328.____.” A substantive provision should be created to specify how to calculate the predicted storm wave height. (Note that the journal articles referred to in the definition should be properly incorporated by reference, if references to them are retained in the rule.)

h. A narrative text should be devised to describe slopes rather than the insiders’ shorthand of “1H:2V” as used in s. NR 328.04 (3) and elsewhere in the rule.

i. The definition of “bulkhead” should read: “a vertical structure that is installed parallel to the shore to prevent the sliding or slumping of the land and to protect the adjacent upland from wave action.” Any discussion of what bulkheads are commonly constructed of should be omitted or placed in a note. Note that this term is generally understood and so this definition most likely is not necessary.

j. *Webster’s Third New International Dictionary, Unabridged*, defines “fetch” as: “4. the distance over open water or land over which the wind blows <...> specif.: the distance traversed by waves without obstruction (as when caused by steady winds).” This leads to two observations. First, since “fetch” means a distance, the term “fetch length” is redundant. Second, with this perfectly serviceable dictionary definition, there is no need to define the term in the rule.

k. Two other terms with standard dictionary definitions that do not need defining in the rule are “revetement” and “riprap.”

l. The definition of “fetch length” uses the term “shore protection point of interest” and the definitions of “high energy site,” “low energy site,” and “moderate energy site” use the term “shore protection site.” These terms are undefined and inconsistent with each other. Since subsequent provisions use the simpler term “site,” it is suggested that the definitions use the simpler term, as well.

m. In s. NR 328.04 (18), the phrase “Hard armor” should be replaced by the defined term “Hard armored.”

n. Section NR 328.07 (4) (b) 2. should not be given a title, since other comparable subunits of that subsection and paragraph are not given titles. Further, since the material in sub. (4) (b) does not grammatically lead into subds. 1. and 2., this material should be renumbered as subd. 1., and subds. 1. and 2. should be renumbered as subds. 2. and 3.

o. Section NR 328.07 (4) (b) 2. contains a great deal of information and many specific requirements, compressed into very little text. This warrants expansion into a paragraph or even subsection of its own, with appropriate subdivisions.

p. Table 1, actually a worksheet, should be given a title and some descriptive information indicating what it is and how it is used. The single reference to it in s. NR 328.07 (4) (b) 1. does not seem sufficient.

q. Since s. NR 328.08 has only one subsection, s. NR 328.08 (1) (intro.) should be renumbered s. NR 328.08 (intro.), the paragraphs renumbered as subsections and the remaining subunits should be renumbered accordingly.

r. Section NR 328.08 (1) (b) (intro.) should end with the phrase “including all of the following:”. Also, the material beginning with “including fish and wildlife habitat,” should be incorporated into the list that follows that introduction.

s. Section NR 328.08 (1) (b) 5. (intro.) should end with the phrase “including all of the following:”.

t. The second sentences of s. NR 328.08 (1) (b) 2., 4., and 5. c. should be placed in notes.

u. Section NR 328.08 (1) (b) 5. c. should begin with a phrase such as: “Potential for impacts on.” However, the words “potential for” do not seem necessary for this subdivision paragraph or for the other subdivision paragraphs in that subdivision.

v. In s. NR 328.08 (1) (c) 2., the notation “i.e.” should be replaced with the phrase “such as” and the notation “etc.” should be replaced with an appropriate catchall description.

w. It appears that s. NR 328.08 (1) (c) 12. and 13. should be numbered s. NR 328.08 (1) (d) and (e). [But see comment 2. q., above.]

x. The substance of s. NR 328.10 should be combined with s. NR 328.03, since both address applicability. Also, in the third sentence of this provision, the first occurrence of the word “of” should be “or”; in the last sentence, “enforce” should be replaced by “in force.”

y. A breakwater is a structure, not the placement of material; the definition in s. NR 328.22 (1) should be rewritten to reflect this. However, again, is this definition for a commonly understood term necessary? Is the definition of “structure” necessary?

z. Section NR 328.23 (intro.) should end with the phrase, “all of the following apply:”. [See also s. NR 328.24 (intro.).]

4. Adequacy of References to Related Statutes, Rules and Forms

a. A copy of the form required under s. NR 328.06 should be provided with the rule.

b. The cross-reference in s. NR 328.07 (intro.) is incorrect. Presumably, it should refer to sub. (4).

5. Clarity, Grammar, Punctuation and Use of Plain Language

a. In s. NR 328.01 (3), the use of the notation “/” should be replaced by the word “or” in the last sentence. In sub. (4), the fifth sentence should conclude with the word “settings” and the new sixth sentence should begin with the word “Therefore,”.

b. The term “hard armored” is an adjective, while the term “hard armoring” is a noun. These terms cannot have the same meaning, as s. NR 328.04 (8) suggests. Also, what are “mechanical components” of an erosion control structure? This implies a machine-like aspect of the structure--is this what is intended?

c. “Integrated toe management” is a noun but s. NR 328.04 (10) defines it as if it were a verb. If this definition is retained, it should be rewritten.

d. In s. NR 328.04 (12) and (13), “1.0 feet” should be replaced by “1.0 foot.” Also, the rule does not specifically assign a definition to a situation in which wave height is exactly one foot or exactly 2.3 feet.

e. In ss. NR 328.04 (23) and 328.05 (1), the word “a” should be replaced by the word “an” before the words “offshore” and “erosion,” respectively.

f. Section NR 328.07 (4) (a) 2. applies only to sites with a slope of exactly 1:2. Should this be a slope of 1:2 *or greater*?

g. As written, s. NR 328.07 (4) (b) (intro.) allows either the applicant or DNR to invoke the exceptions that follow. It would appear that DNR could not overcome the applicant’s belief that the exception should apply. Is this the intended effect? Also, the phrase “as a result of unique site conditions” should be set off by commas.

h. In s. NR 328.07 (4) (b) 1., the symbols meaning greater than and less than should be replaced by the words. Also, the phrases “in the low energy category,” “in the moderate energy category,” and “in the high energy category” should be replaced by the phrases “listed in sub. (1),” “listed in sub. (2),” and “listed in sub. (3),” respectively.

i. In s. NR 328.22 (5), why is the definition of the term “structure” different from the definition of the same term in s. NR 328.04 (22)?